

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.**

**COUNTRYWIDE FINANCIAL CORPORATION,
COUNTRYWIDE HOME LOANS, INC., AND
BANK OF AMERICA CORPORATION**

and

Case No. 31-CA-072916

**JOSHUA D. BUCK and MARK THIERMAN,
THIERMAN LAW FIRM**

and

Case No. 31-CA-072918

PAUL CULLEN, THE CULLEN LAW FIRM

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE
AND BRIEF IN SUPPORT OF EXCEPTIONS**

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Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for the Acting General Counsel respectfully files the following exceptions and brief in support of its exceptions to the decision and order of Administrative Law Judge William G. Kocol.

**EXCEPTIONS OF COUNSEL FOR THE ACTING GENERAL COUNSEL
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Exception	Page	Line	Text
1	2	22	"On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Parties, and Respondent, I make the following..."
2	3	35	"And it is important to note that the complaint does not allege any relationship between the Respondents such as a single- integrated enterprise, joint employer, successorship, or agency.
3	5	7	"Respondents' arguments, however, were not based on any purported waiver of class-based arbitration contained within the arbitration agreement. Rather, Respondents argued that case law, as described below, compelled individual arbitration."
4	5	30	"Importantly, Respondents' have <i>not</i> contended that White and Whitaker have waived their right under the arbitration agreement to act collectively in seeking class-wide arbitration; rather, Respondents' have only argued that case law favors their position and they did not otherwise agree to class-wide arbitration."
5	5	45	"In his brief the General Counsel correctly points [out that] White and Whitaker are statutory employees in a general sense and the facts show that BAC and CFC are employers engaged in commerce. But so is General Motors. "
6	5 – 6	47 - 7	"Importantly, the General Counsel has not pled in complaint or even explained at the hearing any legal

			theory under which BAC and CFC should be held liable for the conduct of CHL. This lack of due process has caused Respondents to guess that the General Counsel is proceeding under a ‘successorship’ theory, given that this was the theory used by the charging parties to join BAC in the lawsuit at issue in this case. But the facts do not support such a theory. Under these circumstances I conclude that the relationship of BAC and CFC to this allegation of the complaint is too attenuated to hold them liable. I dismiss BAC and CFC from this allegation.”
7	6	26	“Nothing in this conclusion should properly be understood to touch upon Respondents’ First Amendment right to petition the Government for a redress of grievances, described more fully in the following section of this decision. Respondents’ remain free to assert their claims concerning the meaning of the arbitration agreement in the lawsuit.”
8	6	29	“Rather, it is only the maintenance of an unlawfully broad policy that I find unlawful, this finding does not require Respondents to alter their litigation position.”
9	6	39	“[A]t no time have Respondents argued that the arbitration agreement, by its terms, compelled only individual arbitrations. I have also described above how Whitaker and White have continued to maintain that their claims should be heard collectively and there is no evidence that Respondents have sought to interfere with, as opposed to disagree with, that contention.”
10	7	22	“So the Section 7 [right] that could not be waived in <i>D. R. Horton</i> was the right of employees to collectively pursue class or collective work-related complaints against their employer. This is different from any right that the claims be heard and decided on a class- wide basis; that issue is for the appropriate forum, and not the Board, to decide. Here, Respondent did nothing more than argue before the

			appropriate forum that the claims be heard on an individual basis, and it did so not on the basis that the employees had waived their right to pursue class-wide claims. Rather, it relied solely on case law that it felt support that position.”
11	8	1	“But by making this argument the General Counsel conflates the Section 7 right to collectively seek class wise [sic] arbitration with the non Section 7 right to actually have their claims addressed in a class wide fashion; as described above this was something the Board was careful to differentiate in <i>D. R. Horton</i> .”
12	8	6	“What the General Counsel is seeking in this case is to have the Respondents stop presenting their legal arguments to the court concerning why class-wide arbitration is not appropriate. If the Board were to do so, it would likely trench upon Respondents’ rights under the First Amendment ‘to petition the Government for a redress of grievances.’” (citations omitted).
13	8	16	“Respondents have not sought to have the court interpret the arbitration agreement in a manner that would violate the Act.”
14	8	20	“That context shows that Respondents are arguing that under existing law, class-wide arbitrations can arise only by agreement of the parties and the arbitration agreement does not so provide. In other words, Respondents are <i>not</i> arguing that under the terms of the arbitration Agreement the employees waived whatever right they may have to make class wide claims. I dismiss this allegation of the complaint.”
15	8	fn. 3	“Fn. 5 of that decision [<i>Bill Johnson’s</i>] offers no way out for the General Counsel because the motions to compel individual arbitration at issue in this case do not have an objective that is illegal under Federal law. To the contrary, those motions simply assert existing Federal case law as view by Respondents.”
16	8	fn. 4	“The complaint also alleges that Respondent

			independently violated Sec. 8(a)(1) by ‘About August 30, 2007, Respondent required employee Dominique Whitaker to agree to the arbitration agreement’ and ‘About September 26, 2008, Respondent required employee John White to agree to the arbitration agreement.’ Of course, those allegations are facially invalid under Sec 10(b) and I dismiss them.”
17	9	25	“Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 22, 2011.”
18	9	36	“IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.”

**BRIEF OF COUNSEL FOR THE ACTING GENERAL COUNSEL IN
SUPPORT OF EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

I. PROCEDURAL HISTORY

A. Procedural History / Hearing Before the National Labor Relations Board

The Honorable William G. Kocol, hereafter ALJ or ALJ Kocol, opened the record in this matter on December 10, 2012, in order for the parties to finalize a joint stipulation of facts. No party called a witness on December 10, 2012. The

Consolidated Complaint alleges, in essence, that Respondent Bank of America (“BAC”), Respondent Countrywide Financial Corporation (“CFC”), and Respondent Countrywide Home Loans, Inc. (“CHL”) (collectively “Respondents”) violated Section 8(a)(1) of the National Labor Relations Act (“the Act”) by maintaining and enforcing an arbitration agreement as a term and condition of employment that infringes upon the Section 7 rights of employees.

On December 18, 2012, the parties filed a Joint Motion and Joint Stipulation of Facts and Joint Exhibits; the General Counsel’s Exhibits were also submitted on this date.¹

On February 13, 2013, ALJ Kocol issued his Decision and Recommended Order (“ALJD”) finding that Respondent CHL violated Section 8(a)(1) of the Act by maintaining an unlawfully broad policy that interferes with employees’ right to file charges with the Board. ALJ Kocol dismissed all other allegations of the Consolidated Complaint.

B. Procedural History and Chronology in the Underlying Civil Litigation

In June 2009, Dominique Whitaker (“Whitaker”), an employee of CHL, filed a class action lawsuit in California state court alleging that Respondents CFC and BAC had violated California state wage-and-hour laws. (Jt. Exh. 3).

¹ The Joint Motion to Accept Parties’ Joint Stipulation of Facts and to Close the Record (the “Joint Stipulation”) is referred to hereafter as “Jt. Stip.” followed by the paragraph number, and, where applicable, a letter designating the subparagraph. All references to exhibits are noted as “Jt. Exh.” All references to the Acting General Counsel’s exhibits are noted as “GC” followed by the exhibit number.

Respondents CFC and BAC removed the action to the United States District Court for the Central District of California (District Court) in August 2009. (Jt. Exh. 4). In April 2010, Whitaker filed a Second Amended Complaint in the District Court. (Jt. Exh. 7). Whitaker was joined in the Second Amended Complaint by Debra Foley, a former CHL employee, who subsequently dropped out of the case. In June 2010, Whitaker filed a Third Amended Complaint in District Court, and former CHL employee John White (“White”) joined as a named plaintiff in the action.² (Jt. Exh. 8).

In March 2011, a stipulation was entered into in a separate action against BAC for Wage and Hour Employment Practices in United States District Court for the District of Kansas, brought by former employees of an entity identified as “Countrywide.” While the stipulation permitted the plaintiffs in the United States District Court for the District of Kansas to move forward as a class, the stipulation explicitly excluded the plaintiffs in Whitaker’s Third Amended Complaint. (Jt. Exh. 5, page 7, Jt. Exh. 6 showing signature).

On August 22, 2011, Respondents BAC, CFC, and CHL, filed a Motion to Compel Individual Arbitration in Plaintiff Dominique Whitaker’s Claims in District Court. (Jt. Exh. 9(A)). On August 22, 2011, Respondents BAC, CFC,

² Respondents in the instant unfair labor practice charges are defendants in the civil litigation actions. Plaintiffs in the civil litigation actions are former employees of CHL, represented by their legal counsel, who are the Charging Parties in the instant unfair labor practice charges.

CHL also filed a separate Motion to Compel Individual Arbitration of Plaintiff John White's Claims in District Court.³ (Jt. Exh. 10(A)). Respondents then:

Move[d] the Court for an order pursuant to the Federal Arbitration Act (the "FAA") . . . compelling Plaintiff[s] to arbitrate individually, and not on a class or collective basis, the claims set forth in [their Complaint], appointing an arbitrator, and staying this action pending the outcome of such individual arbitration.

(Jt. Exh. 9(A), page 8, Jt. Exh. 10(A), page 8).

Plaintiffs in the District Court action responded on August 29, 2011, by filing a Joint Opposition. (Jt. Exh. 11). Respondents filed a Reply in Support of Motions to Compel Individual Arbitrations on September 5, 2011. Respondents argued, inter alia, that plaintiffs in the District Court action failed to meet their burden, had failed to establish any valid basis for not being ordered to submit their claims to arbitration on an individual basis only, and had not established they suffered any prejudice. (Jt. Exh. 12).

On September 19, 2011, the District Court granted Respondents' Motions to Compel Arbitration, although it found that it would be up to the arbitrator to determine whether class or individual arbitration would be appropriate. In particular, the District Court stated in its Order, "[t]he Court . . . finds that the question of whether plaintiffs are subject to individual or class arbitration depends

³ These are referred to collectively as the Motions to Compel.

on the parties' intent and is a question for the arbitrator to decide." (Jt. Exh. 13, page 12).

On June 11, 2012, BAC filed a Motion for Partial Reconsideration of Order Granting In Part Defendants' Motions to Compel Individual Arbitrations of Plaintiffs' Claims (the Motion for Partial Reconsideration). (Jt. Exh. 14). The District Court's Order would defer to an arbitrator whether class and collective or only individual arbitration is allowed under the Arbitration Agreements, but Respondents sought once more to have the District Court compel separate and individual arbitration through its Motion for Partial Reconsideration. (Jt. Exh. 14). Whitaker and White filed an Opposition on June 25, 2012. (Jt. Exh. 15). BAC responded on July 16, 2012 by filing a Reply In Support of its Motion for Partial Reconsideration, reiterating its Motion to Compel Individual Arbitration. (Jt. Exh. 16). On August 20, 2012, the District Court denied Respondents' Motion for Partial Reconsideration and reaffirmed its prior Order that the arbitrator should determine whether class or individual arbitration is appropriate. (Jt. Exh. 17).

Both sides filed writs of mandamus. On October 19, 2012, Paul T. Cullen, Esq., Charging Party in Case No. 31-CA-072918, filed a Petition for Writ of Mandamus Compelling the Court to Confine Its Rulings to the Lawful Exercise of its Prescribed Jurisdiction. (Jt. Exh. 19). On October 30, 2012, Respondents filed

their Petition for Writ of Mandamus to Modify Order Compelling Arbitration to Require Individual Arbitrations. (Jt. Exh. 20).

In sum, Respondents have filed seven separate pleadings with the District Court in an effort to compel former employees Whitaker and White to arbitrate their claims individually.

II. FACTS AND ARGUMENT IN SUPPORT OF EXCEPTIONS

Exception 1. The ALJD's reference to "witnesses" is an error, as no witness testified at the hearing on December 10, 2012.

The ALJ refers to his observation of "the demeanor of the witnesses," but no witnesses testified. (ALJD 2:22-23). In addition, the ALJ refers to the Respondent in the singular when they are pled in the complaint as Respondents.

Exceptions 2, 5, and 6. Respondents -- all three entities -- are the "Employer" under the Act and are liable for the unfair labor practices at issue.

Respondents have argued that this case is brought against BAC and CFC under a misapplied successorship theory. This is incorrect. This case is not about *Golden State* successor liability.⁴ Counsel for the Acting General Counsel is not seeking liability under any successorship theory. Respondents fall within the definition of "employer" in Section 2(2) of the Act wherein an "employer"

⁴ *Golden State Bottling Co., Inc., v. NLRB*, 414 U.S. 168 (1973).

explicitly “includes any person acting as an agent of an employer, directly or indirectly[.]”

The ALJ found that Whitaker and White, plaintiffs in the state and court actions, were employed by CHL.⁵ The ALJ also concluded that CHL violated the Act by maintaining an Arbitration Agreement that interferes with employees’ right to file charges with the Board, and, specifically, that the maintenance of this unlawfully broad policy violates Section 8(a)(1). But the ALJ mischaracterized the relationships among BAC, CFC, and CHL, and, in particular the relationship of BAC and CFC as “too attenuated” to find liability for the Section 8(a)(1) violation. (ALJD 6:7). This is especially incongruous since the ALJ himself points out that Arbitration Agreement, presented to Whitaker on approximately September 30, 2007, and to White on approximately September 26, 2008, “bears the heading ‘Countrywide Financial’ and explains that reference in that agreement to the ‘Company’ means ‘Countrywide Financial Corporation and all of its subsidiary and affiliated entities...and all successors and assigns from any of them.’” (ALJD 4: 8 – 10 and see Jt. Exh. 1, Jt. Exh. 2). This fact not only fails to weaken the relationship between CHL and CFC, but has the opposite effect, as it directly links CHL and CFC in the Arbitration Agreement itself, which is the heart

⁵ The two former employees of CHL, Whitaker and White, were employees within the meaning of Section 2(3) of the Act. See, e.g., *Briggs Mfg. Co.*, 75 NLRB 569, 570 (1947) (the Board interprets “employee” “in the broad generic sense...to include members of the working class generally”); *Little Rock Crate & Basket Co.*, 227 NLRB 1406, 1406 (1977) (Section 2(3) of the Act “means ‘members of the working class generally,’ including ‘former employees of a particular employer’”).

of this matter, and it shows that CFC is the originator of the Arbitration Agreement, the “unlawfully broad policy” that the ALJ concluded violates Section 8(a)(1) of the Act. (ALJD 6: 30)

In addition, the ALJ erred in not finding BAC liable. BAC is the party responsible for the Motions to Compel, as well as the motions and writs subsequently-filed in which it sought to compel individual arbitration. Thus, BAC is independently liable for the alleged violations. As the ALJD points out, BAC is the parent company of CFC and its subsidiaries, including CHL. (ALJD 2:30 – 34). While the ALJ notes that BAC and CFC are employers engaged in commerce, he found that their relationship to the employees was too attenuated to be liable. The ALJ erred in so finding where Respondents repeatedly filed pleadings seeking to enforce an Arbitration Agreement that the ALJ himself had concluded are unlawfully overbroad.

All three Respondents fall within the definition of “employer” in Section 2(2) of the Act, and because the Respondents moved to enforce the Arbitration Agreement which restricts access to the Board and its processes and in such a way as to prevent collective action in arbitral and judicial forums, CHL, CFC, and BAC violated Section 8(a)(1) as alleged.

Exceptions 3, 4, and 13. The ALJ erred in concluding that merely because Respondents do not contend White and Whitaker waived their right to act collectively, Respondents did not violate the Act.

In his decision, the ALJ acknowledged that acceptance of the Arbitration Agreement is far from a voluntary action on the part of the employee. (ALJD 4:30 – 34). At the end of the 16 separate provisions of the Arbitration Agreement, just below the signature of the Senior Managing Director and Chief Human Resources Officer Leora Goren, the Arbitration Agreement explained the consequence of not accepting the its terms and, instead, checking “I Disagree.” The Arbitration Agreement states: “By selecting I disagree, I disagree with the above terms and understand that I will not be able to move forward in the application process at this time.” (Jt. Exh. 1, Jt. Stip. 5(a)-(c). Jt. Stip. 6(a)-(c)). In his decision, the ALJ notes that the prospective employee who does not agree to its terms and conditions during the application process will not move forward. (ALJD 4:30 - 33). Thus, the agreement was expressly imposed as a condition of employment.

In any case, even if they had not been required of all applicants for employment, once these irrevocable and binding agreements were signed and became effective, there can be no doubt that they became conditions of employment. (The instant matter before the Board and the related civil litigation attest to that.) Thus, Respondents forced Whitaker, White, and other members of the public seeking employment in the period from 2007 to at least March 31, 2009 to accept the Arbitration Agreement as a term and condition of employment. (Jt. Stip. 7).

Yet Section 7 vests employees with the right to invoke – without employer coercion, restraint, or interference – procedures generally available under state or federal law for concertedly pursuing employment-related legal claims. *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), slip op. at 10. *See, e.g., Eastex, Inc. v. NLRB*, 437 U.S. 556, 567-68 (1978). By pursuing a litigation course of conduct that precludes class-wide action, Respondents have cornered their employees and denied their ability to act collectively.

Moreover, even if these Arbitration Agreements were not conditions of employment, they would be unlawful. As the Board explained in *D.R. Horton*, employees’ consent to a mandatory arbitration agreement does not render the agreement’s restriction of Section 7 rights lawful. 357 NLRB No. 184, slip op. at 4-5. Waiver is not a prerequisite. Indeed, the Board has long held, with court approval, that employers cannot avoid NLRA obligations, or obviate employees’ rights under the Act, through agreements with individual employees. *See, e.g., J. I. Case Co. v. NLRB*, 321 NLRB 332, 337, 339 (1944), affirming, as modified 134 F.2d 70 (7th Cir. 1943), enfg. as modified 42 NLRB 85 (1942). As the Supreme Court explained shortly after the statute’s enactment, “employers cannot set at naught the [NLRA] by inducing their workmen to agree not to demand performance of the duties which [the statute] imposes. *National Licorice Co. v. NLRB*, 309 U.S. 350, 364 (1940). Consistent with this principle, individual

agreements requiring employees to adjust their grievances with their employer individually, rather than concertedly, “constitute[] a violation of the [NLRA] per se,” even when they are “entered into without coercion,” as they are a “restraint upon collective action.” *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir., 1942), enfg. 33 NLRB 1014 (1941), quoted in *D.R. Horton*, 357 NLRB No. 184, slip op. at 5.

Pursuant to the same principle, the Board has regularly set aside settlement agreements that require employees to prospectively waive their right to act in concert with coworkers in disputes with their employer. See, e. g., *Bon Harbor Nursing & Rehab. Ctr.*, 348 NLRB 1062, 1073, 1078 (2006)(employer unlawfully conditioned employees’ reinstatement, after discharges for non-union concerted protected protest, on agreement not to engage in further similar protests); *Bethany Med. Ctr.*, 328 NLRB 1094, 1005-06 (1999)(same); *Ishikawa Gasket America, Inc.*, 337 NLRB 175 175—76 (2001), enfd. 354 F. 3d 534 (6th Cir. 2004)(employer unlawfully conditioned discharged employee’s severance payments on agreement not to help other employees in disputes against employer or to act “contrary to the [employer’s] interests in remaining union-free,” as the Board held that “future rights of employees as well as the rights of the public may not be traded away in this manner.”) See also, e.g., *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614, 614-16 (2007), in which the Board, while finding a settlement/waiver agreement valid, also made clear that it is reluctant to find that employees have

effectively waived their right to relief over matters that were not yet investigated or even contemplated by the employee.

In this regard, it is noteworthy that in *D.R. Horton*, the Board expressly found arbitration agreements prohibiting collective legal activity to be comparable to “yellow dog” contracts prohibiting employees from joining labor union. 357 NLRB No. 184, slip op. at 5-6. In fact, it may be argued that the Agreement at issue in the instant case interferes with employees’ Section 7 rights even more than traditional yellow dog contracts, as the restrictions on employees’ collective against the Respondents remain in effect even after their employment has ended, and as the mandatory Arbitration Agreements are intended to be fully enforceable in court and thereby to use governmental authority to enforce the prohibition on protected concerted activity. Significantly, the Board has long found that an employer violates Section 8(a)(1) by soliciting such agreements, as such conduct “has an inherent and direct tendency to interfere with, restrain, and coerce employees in the exercise of their rights under Section 7 of the Act...” *Hecks, Inc.*, 293 NLRB 1111, 1120-1121 (1989) (request that employees promise to be bound by employer’s written policy stating the employer does not want and sees no need for a union-represented work force violates Section 8(a)(1)); *Western Cartridge Co.*, 44 NLRB at 6-8, no. 5, 19 (individual employment contract provision giving employer right to fire any employee who participates in a strike or concerted

activity is unlawful); *Superior Tanning Co.*, 14 NLRB 942, 951 (1939), enfd. 117 F.2d 881, 888-91 (7th Cir., 1941)(finding individual contracts that were part of employer's plan to discourage unionization, even if not signed under express coercion, are unlawful restraint on Section 7 rights).

What is at stake is employees' Section 7 right to decide for themselves among the options that the law affords them to address their employment-related concerns. Section 7 does not impose collective activity on any employee. The Board in *D. R. Horton* ruled:

[W]e hold only that employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial. So long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of classwide arbitration. Employers remain free to insist that arbitral proceedings be conducted on an individual basis.

357 NLRB No. 184, slip op. at 12 (emphasis in original).

While *D. R. Horton* does not stand for the proposition that employees have a right for claims to be heard and decided on a classwide basis (ALJD 7:24), it does stand for the proposition that an employer violates Section 8(a)(1) when it takes action to prevent employees from pursuing employment-related claims in both arbitral and judicial forums, as Respondents have done in the instant case. Here, Respondents first imposed a mandatory Arbitration Agreement that is silent as to whether the arbitration may be heard on a collective or class basis and then

explicitly took the position that the Agreement requires individual arbitration and moved for a court order compelling individual arbitration. But it is Respondents' conduct that precludes any forum other than arbitration for resolving employment disputes, and by then taking the position that the Arbitration Agreement mandates individual arbitration, Respondents have effectively foreclosed all collective employment-related litigation. This is the violation that the Acting General Counsel is seeking to cure. The Acting General Counsel is not seeking to require that all claims are heard and decided on a class-wide basis. Rather, the Acting General Counsel seeks an order finding that an employer may not bar employees from collectively pursuing their employment claims in both judicial and arbitral forums.

Exceptions 7, 8, 9, 10, and 15. Respondents' Motions to Compel Individual Arbitration have an illegal motive, and the ALJ erred in his analysis of the First Amendment issues with respect to the instant allegations.

Bill Johnson's Restaurants v. NLRB, 461 U.S. 731 (1983), does not preclude proceeding against Respondents' Motions to Compel. In footnote 5 of *Bill Johnson's Restaurants*, the Court stated that it did not intend to preclude the enjoining of suits that have "an objective that is illegal under federal law." 461 U.S. at 731, 737 n.5. In such circumstances, "the legality of the lawsuit enjoys no special protection under *Bill Johnson's*." *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 834 (1991), *enfd.* 973 F.2d 230 (3d Cir. 1992), *cert. denied* 507 U.S.

959 (1993).

The Board has made clear that it will apply footnote 5 to particular litigation tactics, as well as to entire lawsuits. Thus, for example, in *Wright Electric, Inc.*, the Board found that an employer's discovery request had an illegal objective and violated the Act, even though the lawsuit itself could not be enjoined. 327 NLRB 1194, 1195 (1999), *enfd.* 200 F.3d 1162 (8th Cir. 2000). See also, e.g., *Dilling Mechanical Contractors*, 357 NLRB No. 56, slip op. at 2-3 (2011) (finding that employer's discovery requests had an illegal objective, although the lawsuit itself did not). Accordingly, a footnote 5 analysis is properly applied to Respondents' motions here, despite the fact they arose as a defense in the course of a lawful lawsuit.

Legal actions that have an illegal objective may be found to be unlawful *ab initio*, in contrast to legal actions against "arguably protected" conduct, which are only unlawful to the extent they are continued after the General Counsel issues complaint, pursuant to *Loehmann's Plaza*, 305 NLRB 663 (1991), *rev. denied* 74 F.3d 292 (D.C. Cir. 1996). See, e.g., *Manno Electric*, 321 NLRB 278, 298 (1996), *enfd. per curiam mem.* 127 F.3d 34 (5th Cir. 1997). A lawsuit has a footnote 5 illegal objective "if it is aimed at achieving a result incompatible with the objectives of the Act." *Manno Electric*, 321 NLRB at 297.

In particular, an illegal objective may be found for two reasons relevant to the case presented here. The first of these is where “the underlying acts constitute unfair labor practices and the lawsuit is simply an attempt to enforce the underlying act.” *Regional Construction Corp.*, 333 NLRB 313, 319 (2001). This category includes the illegal union fine cases cited by the Court in footnote 5 itself. *Granite State Joint Board, Textile Workers Union*, 187 NLRB 636, 637 (1970), enforcement denied, 446 F.2d 369 (1st Cir. 1971), rev’d, 409 U.S. 213 (1972); *Booster Lodge No. 405, Machinists & Aerospace Workers*, 185 NLRB. 380, 383 (1970), enforced in relevant part, 459 F.2d 1143 (D.C. Cir. 1972), aff’d, 412 U.S. 84 (1973). In those cases, the unions violated Section 8(b)(1)(A) by fining employee/members, and the lawsuits were merely the mechanism to enforce and collect the unlawful fines.

The second of these is where a grievance or lawsuit is itself aimed at preventing employees’ protected conduct. In such cases, the lawsuit is not merely retaliatory for employees’ protected conduct, but also seeks to use the arbitrator or the court itself to directly interfere with the Section 7 activity. For example, in *Manno Electric, Inc.*, the Board found that an employer’s judicial cause of action attacking employee statements made to the Board was not only preempted, but also had an illegal objective. *Manno Electric*, 321 NLRB at 297.

Even though the underlying arbitration agreements were facially silent as to

individual or class arbitration, Respondents' Motions to Compel and subsequently-filed pleadings in District Court have an illegal objective. It is well established that an illegal objective may be found where a grievance or lawsuit seeks to enforce an interpretation of an agreement that is unlawful under the Act, even if the agreement itself can be read lawfully. In *Elevator Constructors (Long Elevator)*, the Board found an illegal objective and held that a union violated Section 8(b)(4)(ii)(A) by filing a grievance that was predicated on a reading of the collective-bargaining agreement that, if successful, would have resulted in a *de facto* hot cargo clause. 289 NLRB 1095, 1095 (1988), *enfd.* 902 F.2d 1297 (8th Cir. 1990) ("Because we have concluded that the contract clause as construed by the Respondent would violate Section 8(e), we may properly find the pursuit of the grievance coercive, notwithstanding the Supreme Court's decision in *Bill Johnson's Restaurant v. NLRB*"). Here, even if the Arbitration Agreement could be read to lawfully permit collective and class claims, Respondents' Motions to Compel Individual Arbitration and Respondents' subsequent motions seeking to prohibit collective action in both judicial and arbitral forums must similarly be seen to have an illegal objective, as they seek to preclude employees from collective action in both judicial and arbitral forums.

As discussed above, Respondents' Motions to Compel and subsequently-filed motions in the instant cases seek to enforce an Arbitration Agreement that is

itself unlawful in that it restricts access to the Board and its processes and, as interpreted by Respondent, precludes employees from engaging in collective legal activity. Just as in union fine cases, the underlying act constitutes an unfair labor practice and the Motions to Compel are simply an attempt to enforce the underlying unlawful act. In addition, Respondents' Motions to Compel also have an illegal objective because they are directly aimed at preventing employees from engaging in protected conduct. Indeed, the only objective of Respondents' motions before the Board and in District Court is to prohibit employees from engaging in Section 7 activity, because Respondents' motions preclude employees from engaging in protected collective legal activity. For this reason, the motions are unlawful notwithstanding that the District Court, in granting Respondents' Motions to Compel, stated that, "the question of whether plaintiffs are subject to individual or class arbitration depends on the parties' intent and is a question for the arbitrator to decide."

At issue in this case is Respondents' conduct. While the employees may be able to argue to an arbitrator that they are entitled to bring their claims as a class, *Stolt-Nielsen* and *AT&T Mobility v. Concepcion* make clear that the arbitrator has no authority to grant such status over Respondent's objection in the absence of some authorization for class arbitration in the Arbitration Agreements themselves or where, as here, the Agreements are silent as to whether the mandatory

arbitration may be heard on a collective or class basis. See *Stolt-Nielsen*, 130 S.Ct. at 1775 (“a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so”) (emphasis in original); *AT&T Mobility v. Concepcion*, 131 S.Ct. at 1750 (“the agreement at issue, which was silent on the question of class procedures, could not be interpreted to allow them”). Consequently, that the District Court left it up to the arbitrator to determine whether to hear the claims individually or collectively does not remedy the conduct at issue in this case, Respondents’ efforts to preclude collective action in judicial and arbitral forums.

As such, Respondents’ Motions have a footnote 5 illegal objective and are unlawful under Section 8(a)(1) of the Act, and the ALJ erred in failing to so find.

Exceptions 11, 12, 13, 14, 15, and 18. The ALJ misapplied *D.R. Horton* and consequently failed to recognize that the Respondents violated Section 8(a)(1) of the Act by maintaining and enforcing the Arbitration Agreement that interferes with both employees’ Section 7 right to participate in collective and class litigation and employees’ access to the Board and its processes.

In *D.R. Horton*, 357 NLRB No. 184 (2012), the Board held that a policy or agreement precluding employees from filing employment-related collective or class claims against the employer restricts the employees’ Section 7 right to engage in concerted action for mutual aid or protection, and therefore violates Section 8(a)(1) of the Act. In particular, the Board held that “an employer violates Section

8(a)(1) of the National Labor Relations Act when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer.” *Id.*, slip op. at 1 (2012). The Board stated that such an agreement unlawfully restricts employees’ Section 7 right to engage in concerted action for mutual aid or protection. *Ibid.* The Board reviewed its precedent that “has consistently held that concerted legal action addressing wages, hours or working conditions is protected by Section 7.” *Id.*, slip op. at 2 (2012).

The Board made clear that “the applicable test is that set forth in *Lutheran Heritage Village*, and under that test, a policy such as Respondent’s violates Section 8(a)(1) because it expressly restricts Section 7 activity or, alternatively, because employees would reasonably read it as restricting such activity.” *D.R. Horton*, slip op. at 7 (2012), citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). In sum, the Board definitively held that an employer “violates Section 8(a)(1) by requiring employees to waive their right to collectively pursue employment-related claims.” 357 NLRB No. 184, slip op. at 13 (2012).

In the instant cases, as noted above, Respondents chose mandatory arbitration as a means of settling disputes and required employees to sign the Arbitration Agreement to be considered for employment. The Arbitration

Agreement is silent as to whether the mandatory arbitration may be heard on a collective or class basis, but Respondents have explicitly taken the position that the Arbitration Agreement requires individual arbitration, and have moved the court for an order “compelling Plaintiff[s] to arbitrate individually, and not on a class or collective basis.”⁶ Respondents’ conduct has effectively foreclosed all collective employment-related litigation in court or in arbitration.

Therefore, it is clear that Respondents’ Arbitration Agreement is unlawful as applied, because, under *D.R. Horton*, Respondents’ conduct in enforcing the Arbitration Agreement unlawfully restricts and interferes with employees’ Section 7 right to engage in concerted action for mutual aid or protection, and thus violates Section 8(a)(1) of the Act. And, since the Arbitration Agreements are unlawful as applied, Respondents’ Motions to Compel Individual Arbitration and Respondents’ subsequent litigation efforts for the same purpose are also unlawful as further interference with the employees’ Section 7 right to engage in collective legal activity. As the underlying Arbitration Agreements are unlawful under the Act, nothing in the FAA precludes proceeding against Respondents’ Motions to Compel. In *D.R. Horton*, the Board held that finding a mandatory arbitration

⁶ While Respondents may argue that the Arbitration Agreement at issue in this case is lawful under *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), that argument is unavailing. While, the Arbitration Agreement in this case is silent as to whether the mandatory arbitration may be heard on a collective or class basis, Respondents’ motions and efforts to compel individual arbitration demonstrate that Respondents’ interpretation of the Arbitration Agreement forecloses collective arbitration.

agreement to be unlawful, was “consistent with the well established interpretation of the NLRA and with core principles of Federal labor policy, does not conflict with the letter or interfere with the policies underlying the FAA and, even if it did, that the finding represents an appropriate accommodation of the policies underlying the two statutes.” *Id.*, slip op. at 8 (2012).

Initially, the Board noted that: (1) under the FAA, “arbitration may substitute for a judicial forum only so long as the litigant can effectively vindicate his or her statutory rights through arbitration;” and (2) mandatory individual arbitration agreements prohibit employees from exercising their substantive statutory right to engage in collective legal action. *Id.*, slip op. at 9-11 (2012). Thus, the Board emphasized, “nothing in the text of the FAA suggests that an arbitration agreement that is inconsistent with the NLRA is nevertheless enforceable.” *Id.*, slip op. at 11 (2012). Rather, a refusal to enforce a mandatory arbitration agreement’s class action waiver would directly further core policies underlying the NLRA, and is consistent with the FAA. *Ibid.* Therefore, “holding that an employer violates the NLRA by requiring employees, as a condition of employment, to waive their right to pursue collective legal redress in both judicial and arbitral forums accommodates the policies underlying both the NLRA and the

FAA to the greatest extent possible.”⁷ *Id.*, slip op. at 12 (2012). Finally, the Board noted in *D.R. Horton* that, even if there were a direct conflict between the NLRA and the FAA, the terms of the Norris-LaGuardia Act and the rules of statutory interpretation strongly indicated that the FAA would have to yield. *Ibid.*

The Board in *D.R. Horton* specifically addressed two recent Supreme Court decisions which stated that a party cannot be required, without its consent, to submit to arbitration on a class-wide basis. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, ___ U.S. ___, 130 S.Ct. 1758, 1775–1776 (2010) (arbitration panel exceeded its authority by permitting class antitrust claim when commercial shipping charter agreement’s arbitration clause was silent on class arbitration); *AT&T Mobility v. Concepcion*, ___ U.S. ___, 131 S.Ct. 1740, 1751–1753 (2011) (claim that class-action waiver in consumer arbitration agreement was unconscionable under state law was preempted by FAA). Significantly, these cases establish that an arbitrator cannot order class arbitration unless there is a contractual basis for concluding that the parties affirmatively agreed to do so. The Board found that these cases did not affect its application of the Act, as it was not holding that employers were *required* to permit, participate in, or be bound by a class-wide or collective arbitration proceeding. Instead, the Board held only that employers may not compel employees to waive their Section 7 right to collectively

⁷ The Arbitration Agreement made clear that the applicant would not be able to move forward in the application process should he or she check “I Disagree.”

pursue litigation of employment claims in *all* forums, arbitral and judicial.

Thus, so long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of class-wide arbitration, and employers remain free to insist that *arbitral* proceedings be conducted on an individual basis. 357 NLRB No. 184, slip op. at 12 (2012).

For all these reasons, the Board in *D.R. Horton* made clear that nothing in the FAA precludes finding mandatory arbitration agreements that prohibit collective and class litigation to be unlawful. Accordingly, as the Respondents' Arbitration Agreements are themselves unlawful as applied, it follows that nothing in the FAA precludes proceeding against the Respondents' Motions to Compel Individual Arbitration seeking to enforce those unlawful agreements.

Respondents have argued that no violation can be found here because Whitaker and White have collectively engaged in activities for their mutual aid and protection by together filing their Demand for Arbitration with the alternative dispute resolution service known as JAMS. Respondents argue that since Whitaker and White have acted together to pursue their claims against Respondents in arbitration, they have no basis to claim an unfair labor practice or otherwise assert they were prevented from engaging in concerted activities for the

purpose of mutual aid or protection. Respondents have repeatedly moved to obstruct and prevent Whitaker and White from acting in concert, and the fact that the former employee/plaintiffs have together filed documents with JAMS does not excuse Respondents' continuing, ongoing, and persistent efforts to prevent Whitaker and White from engaging in conduct protected by Section 7 of the Act.

Exception 16. Section 10(b) does not bar the proceeding, and the ALJ erred in dismissing Section 8(a)(1) allegations under Section 10(b).

Section 10(b) does not preclude the pursuit of a complaint allegation based on the maintenance and/or enforcement of an unlawful rule within the Section 10(b) period, even if the rule was promulgated earlier. See *Control Services*, 305 NLRB 435, 435 fn. 2, 442 (1991), enfd. mem. 961 F. 2d 1568 (3 Cir. 1992); see also *The Guard Publishing Co.*, 351 NLRB 1110, 1110, fn.2 (2007).

The ALJ notes that although the Arbitration Agreement was signed well outside the 10(b) period, Respondent CHL sought to maintain it within the Section 10(b) period. (ALJD 6: 9). Respondents (CFC and BAC) also filed the August 2011 Motions to Compel Individual Arbitrations. This conduct, and motions subsequently filed by all Respondents established Respondents' unlawful interpretation of the Arbitration Agreements as prohibiting collective legal activity. Like CHL, CFC and BAC have attempted to enforce that unlawful interpretation during a period that is well within the Section 10(b) period. Thus, Respondents

maintained and enforced the Arbitration Agreement within the Section 10(b) period in violation of Section 8(a)(1), as alleged in the Consolidated Complaint. (GC Exh. 1(g), paragraph 7).

Exception 17. The remedy is improper because Respondent CHL has not operated since 2009, and the ALJ erred in failing to find that Respondents BAC and CFC are liable for the same unlawful conduct as Respondent CHL.

Jt. Mot. 4 (a) through (m) shows that CHL ceased operations on or about March 31, 2009. As such, the ALJ's remedy that CHL mail a notice to all current and former employees employed since August 22, 2011, would not remedy the violations. Rather, Respondents should be required to mail a copy of the Notice in this matter to all current employees and former employees who have been employed at any time since the Mutual Agreement to Arbitrate Claims has been in effect.

III. CONCLUSION

In conclusion, Counsel for the Acting General Counsel submits that the ALJ's decision and order should be not be adopted with the exception of his finding that CHL violated Section 8(a)(1) by maintaining an unlawfully broad policy.

DATED AT Los Angeles, California, this 26th day of March 2013.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Katherine B. Mankin', written over a horizontal line.

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Re: COUNTRYWIDE FINANCIAL CORPORATION,
COUNTRYWIDE HOME LOANS, INC., AND
BANK OF AMERICA CORPORATION
Cases: 31-CA-072916 and 31-CA-072918

CERTIFICATE OF SERVICE

I hereby certify that I served the attached **COUNSEL FOR THE ACTING GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE AND BRIEF IN SUPPORT OF EXCEPTIONS** on the parties listed below on the 26th day of March, 2013:

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